IN THE SOUTH GAUTENG HIGH COURT

(JOHANNESBURG)

CASE NO: 17189/08

In the matter between:

M K Applicant

and

R K Respondent

J U D G M E N T

ROOS, AJ:

1 The applicant seeks an order granting him leave to remove his daughter L (to whom I shall refer by her name) from the Republic of South Africa without the consent of L's mother the present respondent. The applicant also seeks consequential relief and costs.

2 The respondent in her counter-application seeks a variation of the custody order to award custody of L to her alternatively she seeks an order that her rights of access to L be specified. She also seeks a costs order.

3 L was born on […..] when the parties were still married. The parties married on [….] and were divorced on [….]. In terms of the settlement agreement concluded between the parties, which was made an order of court, custody of L was awarded to the respondent subject to the applicant's rights of access which were specified in the agreement.

4 On 5 June 2006 pursuant to an urgent application (the urgent application) launched by the applicant the High Court of South Africa (Transvaal Provincial Division) made an order that varied the divorce order and awarded custody of L to the applicant. This order was granted under the following circumstances:

4.1 During September 2005 L's teacher noticed that L was behaving strangely. She reported this to the respondent. Pursuant to this report an investigation was done by Heather Benfield a social worker. Her report is dated 12 September 2005. A copy of her report is attached to the urgent application a copy of which papers have been made available to me by the applicant's attorney with the consent of the respondent.

4.2 Apparently it was suspected that the applicant might have sexually abused L and the respondent decided not to allow the applicant to exercise his rights of access.

4.3 Following correspondence between the attorneys of the parties it was decided that expert reports would be sought from Dr P. M. Duchen and Dr A. Rencken-Wentzel both of whom are counselling psychologists. Rencken-Wentzel prepared a report dated 7 March 2006 and Dr Duchen prepared a report dated 15 March 2006. Copies of both reports are attached to the urgent application.

4.4 Rencken-Wentzel in her report recommended *inter alia*:

- That both the parties should consult a psychiatrist.
- That L should consult both a psychiatrist and a psychologist.
- That a case manager should be appointed who would draft a parenting schedule for the next three months and would have certain other rights and obligations.
- L would live with each of her parents for one week at a time. This was to continue for six months.

At the end of the report it is recorded that should either of the parties not agree to the proposals that Rencken-Wentzel and Duchen would make alternative recommendations.

4.5 Duchen in her report agreed with the recommendations made by Rencken-Wentzel.

In passing I may comment that the recommendations made by Rencken-Wentzel and Duchen are somewhat extreme and in effect amount to a variation of the existing custody order. Their recommendations do not in my view appear to be justified by the content of either of their reports.

4.6 Their recommendations were not acceptable to the respondent. Despite this neither Rencken-Wentzel nor Duchen appeared to have made alternative recommendations.

4.7 On 12 March 2006 Tracy Morrison (Morrison) telephoned the applicant. She said she was a police woman from Sandton Police Station and wanted to meet with the applicant. The applicant went to the Sandton Police Station and met with Morrison who was in plain clothes and was wearing an FBI badge with her photograph on it. She advised the applicant that she worked for the United States of America Department of Justice. The respondent was also present at this meeting.

4.8 Morrison said that although she did not believe the allegations of sexual abuse made against the applicant she was nevertheless obliged to arrest the applicant. She offered the applicant two choices. The first was that the applicant would be arrested and detained without bail until the complaint was heard. This would entail the applicant remaining in prison for some months whilst the matter was being investigated. The second choice was that the parties orally agree that L be placed in Morrison's care where she would receive the necessary care and treatment at the expense of the Government of the United States of America. Morrison apparently contended that she had a court order which entitled her to keep L for 90 days and had the option to renew the order

for up to a year if necessary. The court order was apparently not requested by either of the parties.

4.9 Despite the bizarre nature of the representations made by Morrison both parties agreed to the second option that L be placed in Morrison's care.

4.10 The applicant re-married on 19 March 2006. After his return from honeymoon he instructed his attorney to investigate Morrison. The investigations revealed that Morrison was a fraud and was not employed by the S A Police. She was known to the American Embassy who were apparently also investigating her on charges of fraud. She was not a member of the FBI nor was she employed by the American Department of Justice.

4.11 Criminal charges were laid against Morrison and the applicant launched the urgent application *ex parte*.

4.12 On 24 May 2006 the court ordered that interim custody of L be awarded to the applicant pending an application for a variation of the custody order that had to be launched within 30 days.

4.13 On 5 June 2006 by agreement between the parties the court granted an order the relevant portions of which are:

> "2. The applicant is awarded custody of the minor child L K (the minor child).
>
> 3. The second respondent is to be granted reasonable rights of access to the minor child such access to be phased in and exercised in accordance with the recommendations made by the minor child's counselling psychologist (currently Anne-Marie

> Rencken-Wentzel but also whomsoever may be attending in the future).
>
> 4. The applicant assumes the responsibility of fully maintaining the minor child subject to his rights to approach the maintenance court in the future should current circumstances change."

5 There have been accusations and counter-accusations made by the parties as to who was responsible for allowing Morrison to take L into her custody. It is not necessary to make a finding in this regard. Suffice it to say that both parties were misled by Morrison's fraudulent misrepresentations and that both parties agreed to L being placed in her custody. It is also not necessary to make a finding as to whose version of the circumstances under which the order a copy of which is annexed as Annexure MK1 in this application was granted on 5 June 2006. The respondent's version of why she consented to the order appears however to be the more probable.

6 It does not appear from the papers how the applicant managed to regain custody of L from Morrison but she appears to have been in his custody since June 2006.

7 In January 2008 there was a robbery at the applicant's home. The applicant's wife, L and her half-sister T were held up at gunpoint by a number of men. This has traumatised both the wife and L. T was 17 months old at the time.

8 Although it is not stated exactly when the applicant decided to emigrate to Israel it appears to have been shortly after the robbery as on 12 March 2006 the applicant concluded a written agreement with the respondent to enable L to emigrate. A copy of the agreement is attached as Annexure MK2 to the application. The relevant portions of the agreement are as follows:

> "7. M has elected to relocate to Israel.
>
> 8. It is recorded that this decision was only arrived at after careful consideration with L's best interests being of paramount importance. The prevailing circumstances in the Republic of South Africa being borne in mind.
>
> 9. The parties have agreed that the proposed relocation is in L's best interest.
>
> 10. Thus this agreement serves to confirm that M as custodian parent is hereby granted permission by R to relocate to Israel together with L.
>
> 11. Furthermore it is recorded that R K undertakes to sign all the necessary documentation to give effect to the proposed relocation and furthermore that she will comply with all reasonable requests in connection therewith."

The agreement was signed by both parties. The respondent subsequently withdrew the consent to allow L to emigrate contained in the agreement.

9 The respondent contends that she signed the agreement Annexure MK2 because she had been deprived of access to L since June 2006 and that the applicant promised her that he would grant her access to L if she signed the agreement. She says she withdrew her consent to allow L to emigrate when the applicant breached this promise. There is a dispute on the papers as to exactly what was promised and who committed the breach of the agreement. It is not necessary for me to decide this dispute as I do not consider that I am bound by the agreement Annexure MK2. It is for the court to decide what is in the best interests of the child.

10 The papers before me reveal a great deal of animosity between the parties which unfortunately has led to bitter, protracted and costly litigation. Neither party asked for a referral to evidence. Where there are factual disputes that require to be decided I have applied the principles

laid down by Corbett JA (as he then was) in **Plascon-Evans Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (A) at 634H-635D.

11 The guiding principle in deciding issues such as are raised in this application is laid down by section 28(2) of the Constitution:

> "A child's best interests are of paramount importance in every matter concerning the child."

12 The approach to be followed was laid down by Scott JA in **Jackson v Jackson** 2002 (2) SA 303 (SCA) at 318E-I:

> "It is trite that in matters of this kind the interests of the children are the first and paramount consideration. It is no doubt true that generally speaking where following a divorce, the custodian parent wishes to emigrate a court will not likely refuse leave for the children to be taken out of the country if the decision of the custodian parent is shown to be *bona fide* and reasonable. But this is not because of the so-called rights of the custodian parent; it is because in most cases even if the access by the non-custodian parent would be materially affected it would not be in the best interests of the children that the custodian parent be thwarted in his or her endeavour to emigrate in pursuance of a decision reasonably and genuinely taken. Indeed one can well imagine that in many situations such a refusal would inevitably result in bitterness and frustration which would adversely affect the children. But what must be stressed is that each case must be decided on its particular facts. No two cases are precisely the same and while past decisions based on other facts may provide useful guidelines they do no more than that. By the same token care should be taken not to elevate to rules of law the *dicta* of judges made in the context of the peculiar facts and circumstances with which they were concerned."

13 For the applicant to succeed the applicant had to show that his decision to emigrate was both *bona fide* and reasonably and genuinely taken and that it was in the best interest of L. As stated by Scott JA in **Jackson**'*s* case each case must be decided on its own particular facts. See also **F v F** 2006 (3) SA 42 (SCA) at 47E-F.

14 Apart from the approach to be followed as laid down in *Jackson's* case the court has also borne in mind that a court should be reluctant to interfere with the decisions of a custodian parent. This appears from the following extract from the decision of Miller JA (as he then was) in **Du Preez v Du Preez** 1969 (3) SA 529 (D&CLD) at 532E-F:

> "This is not to say that the opinion and desires of the custodian parent are to be ignored or brushed aside; indeed the court takes upon itself a grave responsibility if it decides to override a custodian parent's decision as to what is in the best interests of his child and will only do so after the most careful consideration of all the circumstances including the reasons for the custodian parent's decision and the emotions or impulses which have contributed to it."

This extract was referred to with approval in **F v F** *supra* at 48E.

15 In paragraph 16 at page 7 of his founding affidavit the applicant states:

> "Around the time of our marriage (i.e. 19 May 2006) J (his present wife) and I discussed emigrating to Israel by no later than early 2009. We intended to have a child of our marriage and believed that our children could obtain a better Jewish education in Israel than in South Africa."

There is no mention of the proposed intention to emigrate in the urgent application pursuant to which the applicant obtained the custody of L. Having regard to the respondent's present attitude to the proposed emigration I have little doubt that she would have opposed the application for the variation of the custody order had she been aware at the time of the applicant's intention to emigrate. The respondent refers to the applicant's failure to disclose his intention to emigrate as "a material non-disclosure" (see paragraph 42.1/2 page 73). The applicant rejects this contention (see paragraph 34.1 page 330). On the papers I am bound to accept the respondent's version.

16 The applicant states that his reasons for wanting to emigrate to Israel are:

16.1 The children could obtain a better Jewish education in Israel than in South Africa. The education they could get in Israel is only available in South Africa at expensive private schools which he says he cannot afford.

16.2 His two sisters live in Israel and his parents emigrated to Israel in November 2008. His two sisters have nine children between them all of an age that they can be friends of L's.

16.3 His wife J's only sibling, her sister, is planning to emigrate to Israel with her husband and three children. The three children are friends with L.

16.4 He is 40 years old and emigration will become more difficult as he grows older as will his chances of obtaining employment in Israel.

16.5 He anticipates that he will be able to earn enough to provide for his family without J being required to work.

16.6 He was born in Israel and has an Israeli passport. L and T also have Israeli passports.

16.7 He intends settling in Modiin a city that has schools where L can obtain the education he wants her to have at state expense. Modiin is close to where his and J's extended family are or will be living and this will facilitate a "richer family life" than they have in South Africa.

16.8 The robbery that has been referred to above has influenced the timing of the planned emigration.

17 I will deal with the applicant's reasons *seriatim*:

17.1 The applicant contends that L will obtain a better education in Israel than in South Africa. Unfortunately the applicant provides no details in support of this contention. He does not state where L is presently at school nor which secondary school she is likely to attend. He does not state what the "Jewish education" is that she presently obtains, if any, nor what such "Jewish education" would be in Israel. The respondent states that L attends Rivonia primary school. Neither party however provides any detail of the nature of the education that L is receiving at the school. The applicant provides no detail of any investigation made by him of the schools in Modiin nor of which school L will be attending. It appears that if she goes to Israel that L will be attending a school where the classes will be given in Hebrew. It is not in dispute that L does not speak Hebrew. The applicant in reply says that L is attending Hebrew lessons and that the Israeli Immigration Department and the Modiin Municipality provide intensive Hebrew study programmes to facilitate integration into the community and the country. No detail is provided of either of the programmes nor is any detail provided of how L is coping with her Hebrew lessons. Whilst it is probable that L would eventually learn sufficient Hebrew to enable her to communicate it is not possible to determine how long this would take nor what effect her inability to speak Hebrew would have on her school career. It is self-evident that if she cannot speak Hebrew, which is the language of instruction, that this could have a detrimental effect

on her schooling. No detail has been provided of whether L will be able to integrate socially and culturally in Israel. In particular whether she will be able to make friends in Israel having regard to the language barrier.

As regards the applicant's alleged inability to afford private school fees the applicant provides no details of his income or expenditure nor what the private school fees are. He has also not responded to the allegation made by the respondent that the Jewish Social Services will ensure that no Jewish child is denied a Jewish education and that they will either pay or subsidise private school fees in South Africa.

In my view insufficient detail has been provided to enable me to decide whether it is in L's best interests to be removed from her school and her friends in South Africa or that she will be better off in Israel.

17.2 The fact that the applicant's parents and siblings live in Israel is an important factor to be considered. No details are however provided of how close the applicant is to his parents or his siblings. The applicant does not respond to the allegation made by the respondent that when she and the applicant lived in Israel during their marriage there was little family support or assistance from his siblings. She says that the claim to have a family support system in Israel is overstated. In any event having a family support system does not in my view weigh up against the need to recreate and then maintain the relationship between L and her mother the respondent which I will deal with more fully below.

17.3 The fact that J's sister plans to emigrate to Israel is not a factor of much significance as too few details are given of her plans. It is not stated exactly when she plans to emigrate. This application was launched in June 2008. There is no indication that she has emigrated as yet. It is not stated where in Israel she will be living nor how close to Modiin this will be. It is not stated what the relationship is between J and her sister who lives in Durban nor what contact they have with each other at present or are likely to have with each other in Israel.

17.4 The applicant says that he is 40 years old and that emigration will become more difficult as he grows older. However he has an Israeli passport. Both his children have Israeli passports and he says that J will have no difficulty in obtaining an Israeli passport. With the whole family holding Israeli passports I cannot conceive that age will play any role in relocation.

He also says that it will become more difficult for him to obtain employment in Israel as he grows older. Whilst I accept that this might be so the applicant provides very little detail of exactly what his qualifications are, the work that he does in South Africa or if he has made any investigations in Israel as to possible employment there. All he says is:

> "At present I will have no difficulty obtaining employment in Israel. I am a qualified engineer with a post-graduate degree and over 15 years of experience and I presently work within the IT field. I anticipate that I will find a job within one month of our arrival in Israel as it is a country that relies on a great deal of technology offering employment to many people in the fields of engineering and IT. I am likely to earn a sufficient salary to provide for J and my daughters without J being forced to take up employment purely to earn a salary."
> (paragraph 19 page 8)

It is not apparent exactly what the qualifications are that the applicant holds nor in what field his 15 years of experience are. It is not stated what work he does at present. No details are provided of the facts upon which he relies for his statement that he would be able to find a job within one month of his arrival in Israel. He does not state that he has made any enquiries to establish whether jobs in the field in which he wishes to work are being advertised or are available. He does not state what he earns in South Africa nor what enquiries if any he has made to ascertain what he might be able to earn in Israel. His statement that he is likely to earn a sufficient salary to provide for his family in Israel appears to be based purely on speculation.

17.5 The fact that the applicant was born in Israel and that he and his daughters hold Israeli passports is not in my view a valid reason to justify emigration. As stated above it would merely make emigration easier.

17.6 The applicant states that he intends settling in Modiin a city that has schools where L can obtain the education he wants her to have at state expense. He says that Modiin is close to where his and J's extended family are or will be living and that this will facilitate a "richer family life" than they have in South Africa.

Both these reasons have been dealt with above.

17.7 The applicant says that the robbery at his home has "determined" the timing of the planned emigration (paragraph 26 page 10). However, the robbery appears to be an isolated incident and no further incident has occurred since January 2008. The applicant provides no details of the incidents of crime in the area in which he

lives nor is there any detail provided of crime statistics in Modiin. As pointed out by the respondent the applicant simply ignores the fact that Israel is in a constant state of war with the Palestinians or its neighbours. Although J and L were traumatised by the robbery this is something that can be dealt with by counselling. I cannot find on the facts placed before me in this application that the applicant and his family will be safer in Israel than they are in South Africa.

18 The applicant has not provided sufficient detail to persuade me that it would be in L's best interest to emigrate to Israel. On 26 November 2008 Joffe J ordered that an independent psychologist be nominated by the Family Advocate to prepare a report that urgently addressed the issues relating to the respondent's contact with L. Dr Debrah Bernhardt was nominated and her report dated 16 December 2008 is annexed as Annexure RK51 to the respondent's replying affidavit. It is clear from this report that L is eager to emigrate to Israel. This is a factor that has to be borne in mind. See **F v F** *supra* at 52E-F.

Dr Bernhardt states in her report that L believes that Israel will take away all her hurtful memories and solve her problems. This is clearly naïve and unrealistic. Her wishes therefore cannot be decisive. It does not appear to me that at her age L is able to appreciate what it will entail to remove her from her established friends and familiar school and surroundings and thrust her into a foreign environment where she does not speak the language required for her schooling or social activities. Furthermore it is significant in my view that no assessment has been done in respect of the suitability of L to be educated in Israel in a language which she cannot speak.

19 I am satisfied for the reasons set out above that the applicant has failed to make out a proper case and that his application cannot succeed.

20 As regards the counter-application:

20.1 It is common cause that the respondent has had no access to L since the custody order was varied on 5 June 2006 save for a visit under supervision in Durban on 5 and 6 April 2008 and occasional telephonic contact. The applicant states that this is because the respondent has "chosen not to see L for a period of almost two years" (paragraph 49 page 16).

20.2 The respondent's version is:

20.2.1 she has repeatedly and persistently asked for access/contact by way of e-mail and sms but the applicant has consistently refused to grant her same (paragraph 20.6.6 page 58);

20.2.2 respondent's attorney has since September 2007 in writing repeatedly requested access/contact but such requests have not been successful (paragraph 74.3 page 102, paragraph 76.1/2 page 103);

20.2.3 that the agreement Annexure MK2 that she signed to allow L to be removed from South Africa was part and parcel of an agreement that she would have access to L from 5 to 6 April 2008 and 1 to 4 May 2008. In breach of this agreement the applicant allowed access to L only on 5 and 6 April 2008 for a few hours and under supervision. The applicant refused access to L from 1 to 4 May 2008 even under supervision (paragraph 76.5/6 page 103).

21 There have been numerous requests by the respondent's attorney regarding access. These requests have met with either no or unsatisfactory responses.

22 The applicant's attitude is that he is entitled to rely on paragraph 3 of the court order in terms of which he obtained custody of L, a copy of which is annexed as Annexure MK1 to the application, and which is quoted above. In terms of the order the respondent's right of access was to be phased in and exercised in accordance with the recommendations made by L's counselling psychologist who at the time of the order was Dr Rencken-Wentzel. Dr Rencken-Wentzel made a recommendation on 11 July 2006. This recommendation was addressed only to the applicant's attorney and despite repeated requests was not forwarded to the respondent or her attorney. It is only on 3 September 2008 that the applicant's attorney forwarded a copy of Dr Rencken-Wentzel's report to the respondent's attorney (see Annexure RK43 page 211).

23 The report of Dr Rencken-Wentzel is annexed as Annexure RK44 at pages 212/3. The report is dated 11 July 2006. It is addressed to Allan Levin and Associates Attorneys who are the applicant's attorneys. It reads as follows:

> "Dear Mr Thomas
>
> RE: L K – L654
>
> 1. Your letter dated 7 March 2006 refers.
>
> 2. I am of the opinion that it will be in L's best interest if access both physical and telephonic is currently supervised. I want to recommend that the recommended supervised access continue until L's therapist Ms Wendy St Claire is of the opinion that L is stable enough that monitored access can be considered. Thereafter evaluated access is indicated. I want to suggest the above recommendations be implemented as follows in conjunction with Ms St Claire:
>
> - For a period of six months L to see her mother once a week for an afternoon of two hours in the direct presence of a supervisor. These visits should initially be

in the office of the supervising professional. I want to recommend that Mr David Barlin be considered as the supervisor. It is recommended that the supervisor file a regular monthly report.

- Depending on L's emotional status I want to recommend that for the next six months she receives unmonitored telephone calls from her mother and go on short visits with her mother to visits with friends and family who are apprised of the situation. L should be seen by her therapist today following a visit with her mother. Mrs K should receive parent counselling. If there is any regression in L access should revert to the two hour direct supervised access.

- After a year half-day visits once a week for three months. Then full-day visits for three months closely monitored by the therapist can be considered. After eighteen months access should be reviewed.

3. Should you need any further information please do not hesitate to contact the undersigned.

Sincerely

Anne-Marie Rencken-Wentzel"

The report is very superficial. It is apparent that Dr Rencken-Wentzel did not consult with or even see either of the parties or L before the report was written. The report appears to have been written in response to a letter from the applicant's attorney dated 7 March 2006 but this letter does not form part of the papers. Bearing in mind that Dr Rencken-Wentzel made the recommendations in this report without seeing the parties the assumption must be made that she relied on her assessment of the parties which led to her previous report dated 7 March 2006 a copy of which is attached to the urgent application. I have sought in vain in the report of March 2006 for any grounds on which Dr Rencken-Wentzel's recommendations in her report of July 2006 can be justified. It must be borne in mind that Dr Rencken-Wentzel's report of March 2006 was aimed at determining whether L had been sexually

molested. This report was prepared at a stage when the respondent was the custodian parent and no application had yet been made for the variation of the custody order. I am satisfied that there is nothing in the March 2006 report of Dr Rencken-Wentzel that justifies her recommendation that the respondent should only have supervised access to L. On the contrary she makes the following statements in her March 2006 report:

> "L enjoys a close relationship with her mother but an ambivalent relationship with her father."
> (at page 150 of the urgent application)

and:

> "L seems to have a predominantly positive relationship with her mother. However she seems to feel ambivalent towards her father and perceives him to feel negative towards her."
> (at page 151 of the urgent application)

24 No motivation at all has been supplied by Dr Rencken-Wentzel for the recommendations she makes in her report of July 2006. As stated it is a report that apparently was prepared at the request of the applicant's attorney. It cannot in my view be justified on any grounds and I have little hesitation in rejecting the recommendations made. To the extent that the applicant contends that he has relied on these recommendations to deprive the respondent of access to/contact with L I find:

24.1 The recommendations have caused incalculable harm.

24.2 They are so bad that no reasonable person would have relied on them and the applicant was not in the circumstances entitled to rely on them to deprive the respondent of access to/contact with L.

25 Despite the applicant's contention that he relied on Dr Rencken-Wentzel's recommendations in governing the access to L he appears in my view to have gone much further than even her recommendations. In this regard Dr Rencken-Wentzel's second recommendation was that the respondent be permitted to have unmonitored telephone calls with L. The applicant of his own volition and for no understandable rational or logical reason decided that the respondent was entitled to phone L only once a week at 16h20 on a Friday. Apparently when the respondent did not comply with this arrangement she was not allowed to speak to L. When the respondent withdrew her consent to L emigrating the contact was reduced to a telephone call once every second week before it was terminated completely.

26 I find it deplorable that the applicant should allow his hostility to the respondent to effect adversely the reasonable exercise by the respondent of her rights of access to L. I have no doubt that such acrimony has had a detrimental effect on L's peace of mind and feeling of security and also her feelings of hostility towards the respondent that are referred to in the report of Dr Bernhardt.

27 Ms Julyan SC submitted that because of the implacable hostility shown by the applicant to the respondent that the only way in which a normal relationship can be restored between the respondent and L is for the court to vary the custody order and award custody of L to the respondent. She relied for this submission on **Germani v Herf and Another** 1975 (4) SA 887 (AD) at 905A-B and **V v V** [2004] 2 FLR 851 (FD).

28 Because of what I regard as the applicant's unreasonable conduct I was sorely tempted to vary the custody order. After much anxious

consideration however I have decided not to do so for the following reasons:

28.1 The passage relied on by Ms Julyan in the **Germani** case is as follows:

> "A note of warning should I think be added here. If appellant's access continues to be frustrated or prevented by first respondent or the child the court may well have to consider seriously in the light of all the circumstances, apart from any question of enforcing the committal order against first respondent whether the only solution is to award the custody of the child to appellant at any rate for such time as he deems fit. (Cf. *Edge v. Murray*, 1962 (3) SA 603 (W) at p. 607.) That would afford an effective opportunity for father and son to become reconciled." (per Trollip JA)

The reference to the matter of **Edge v Murray** is a judgment by the same judge in which a similar warning was issued.

Counsel representing the parties were not able to refer me to a single South African matter in which there has been a variation of the custody order because of the custodian parent's hostility to the non-custodian parent resulting in the non-custodian parent being deprived of proper and reasonable access nor was I able to find any such matter myself. Ms Julyan SC submitted however that I should follow the order of Bracewell J in the Family Division in **V v V** *supra* in which such an order was made. The facts in **V v V**, however, differ substantially from the facts in this matter. The hostility of the custodian parent in that case was even more severe than in this case and led to repeated litigation between the parties. Bracewell J found in *V's* case that the mother had agreed to contact between the father and the children without any intention of making it work and that she actively influenced the children against the father and tried to break off such

relationship as there was. That is not the case in this matter even though the applicant has in my view acted unreasonably and irresponsibly.

28.2 A more weighty consideration was whether it would be in the interests of L to vary the custody order at this stage before there has been a restoration of the relationship between her and her mother. I cannot disregard the report of Dr Bernhardt that L harbours feelings of anger and hostility towards the respondent. I believe that it is only through a restoration of the relationship with her mother that these feelings of hostility and anger will be tempered, but, because they exist, I cannot at this stage find that a variation of the custody order is in her best interest.

29 Because of the relationship between the parties I am of the view that it is necessary to define more specifically the respondent's rights of access. Ms Julyan SC submitted that I should ignore the report of Dr Bernhardt and grant the respondent immediate direct access. Dr Bernhardt, however, appears to have prepared a well-balanced report and her recommendations clearly reflect her view of what is in the best interests of L. I cannot simply reject all her recommendations. Some of the recommendations, however, do not accord with the mandate given to her by the order of Joffe J referred to above. I must also bear in mind that many of her recommendations require the active co-operation of the applicant. Because there has been a singular lack of co-operation from the applicant in the past I have made provision for this in the order as was done in the matter of **Germani v Herf and Another** *supra* at 907F.

30 I have also borne in mind the following dictum from **Germani v Herf and Another** at 899 D-G:

> "I think that undue importance was attached to the first respondent's evidence and the child's own profession of his intractability. No doubt the attitude of the child ought to be taken into account in appropriate circumstances, especially where he is nearly adult. But here the child, despite appearing older than he actually is, is still young, immature in mind, impressionable and, notwithstanding his stubbornness, unable to decide for himself what is in his best interests. Indeed, Dr. Wolf's impression after examining the child was that, in regard to his averred dislike of appellant's visiting him, he has 'accepted (the) views expressed in his maternal home'. Moreover, to attach such decisive importance to the child's own professed intractable attitude as the learned Judge has done means that the child is thereby being allowed to frustrate access orders recently agreed upon by his parents and solemnly granted by the Court as being in his best interests. That surely cannot be right. Generally, the correct judicial approach should be that the refusal or reluctance of a young child to submit to access is not by itself a reason for disobeying an order of Court conferring such access."

In having regard to the above dictum, I have borne in mind that L is not yet ten years old. In addition, I have no doubt that her attitude to the respondent has been influenced by the applicant's attitude to the respondent. If I should order the applicant to co-operate in insuring that the respondent is able to exercise her rights of access, as I intend to do, I have no doubt that this will in itself contribute in a change in L's attitude to the respondent. What is required of the applicant to "co-operate fully" is that should L refuse to speak to the respondent or to go to the respondent or in any manner not allow the respondent to exercise her rights of access as defined in the order I give, that the applicant will then use his parental authority and usual parental disciplinary techniques in order to compel L to submit to the respondent's access. See **Germani v Herf and Another** *supra* at 900H – 901A and Oppel v Oppel 1973 (3) 675 (T).

31 I cannot find that the parties in pursuing these proceedings did not act in what each *bona fide* perceived to be L's best interests. This being so I am of the view that each party should bear his or her own costs. Although the respondent has obtained substantial success in the matter I

have decided not to award her costs for the above reason and for the additional reason that she appears to be funded in this matter by a benefactor who is not identified on the papers. As a mark of my displeasure with the applicant's conduct in depriving the respondent of access to L I am going to order that he bear the costs of the treatment that I believe is necessary to restore the relationship between L and the respondent.

32 It remains only to say something about the replying affidavits that have been filed by both parties in this matter. The replying affidavit filed by the applicant together with its annexures is eighty seven pages. The replying affidavit filed by the respondent together with its annexures is a hundred and twenty seven pages. Both the replying affidavits are replete with unnecessary repetition and in my view both amount to an abuse of the process of the court. In this regard practitioners should be guided by the recently expressed views of the Supreme Court of Appeal (per Schutz JA):

"In the great majority of cases the replying affidavit should be by far the shortest.But in practice it is very often by far the longest – and the most valueless.....Being forced to wade through their almost endless repetition when the pleading of the case is all but over brings about irritation, not persuasion.It is time that the courts declare war on unnecessarily prolix replying affidavits and upon those who inflate them."

See The Minister of Enviromental Affairs and Tourism and others v Phambili Fisheries (Pty)Ltd and another 2003(6) SA 407 (SCA) at para. 80 page 439

33 I make the following order:

1. The application is dismissed.

2. The order granted by the High Court of South Africa (Transvaal Provincial Division) dated 5 June 2006 is amended by deleting paragraph 3 thereof and substituting therefor the following:

"3.

3.1 A case manager is to be appointed to monitor the reconstruction of the relationship between the minor child and her mother, the second respondent and to ensure that both parents promote the other as a good parent. Should the parties not within 10 days of the date of this order agree on the person to be appointed as the case manager the Family Advocate will appoint an appropriate person. The costs of the case manager are to be paid by the applicant.

3.2 The minor child and the second respondent are to attend reconstructive therapy sessions for two hours every second week in Johannesburg for a minimum period of three months. Should the parties not within ten days from the date of this order agree on the therapist to be appointed the Family Advocate will appoint a therapist. The costs of the therapist are to be paid by the applicant.

3.3 The minor child is to attend individual psychotherapy every second week for a minimum period of three months in order that her psychological status is monitored. The costs of the psychotherapy are to be paid by the applicant. The psychotherapist is to be appointed by the applicant.

3.4 The applicant and the respondent are to attend parental guidance sessions for a minimum period of three months. The number of sessions to be attended is however to be determined by the therapist appointed. Should the parties not within 10 days of the date of this order agree on the therapist to be appointed the Family Advocate will appoint a therapist. The costs of the therapist are to be paid by the applicant.

3.5 As from September 2009 the respondent will be entitled to have the minor child with her for one weekend per month from after school on a Friday until Sunday evening.

3.6 As from September 2009 the respondent shall be entitled to have the minor child with her for every short school holiday (being a holiday of less than two weeks).

3.7 As from September 2009 the respondent shall be entitled to have the minor child with her for one-half of every long school holiday (being a holiday in excess of two weeks).

3.8 The respondent shall be entitled to telephone the minor child as follows:

- daily at an appropriate time;
- on the minor child's birthday;
- on the respondent's birthday;
- on Mother's Day;
- on any significant religious Jewish holiday.

It is recommended that the parties acquire Skype and a webcam so that during the telephonic contact it is possible for the respondent and the minor child to see each other while they converse with each other.

3.9 The applicant is ordered to cooperate fully with the respondent to enable her to exercise her rights of access set out above."

3. Each party is to pay its own costs.

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ROOS AJ

ACTING JUDGE OF THE HIGH COURT

COUNSEL FOR THE APPLICANT	ADV G HARDY
INSTRUCTED BY	ALLAN LEVIN & ASSOCIATES
COUNSEL FOR THE RESPONDENT	ADV J JULYAN SC ADV S ROSE
INSTRUCTED BY	SUSAN ABRO ATTORNEY
DATE OF HEARING	24 APRIL 2009
DATE OF JUDGMENT	6 MAY 2009